BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANA S. HOFFER Claimant	)	
VS.	)	
	)	DOCKET NO. 158,156
RUBBERMAID, INC., formerly known as RUBBERMAID-WINFIELD, INC. Respondent	)	
AND	)	
LUMBERMENS MUTUAL CASUALTY Insurance Carrier	)	

ORDER

ON the 13th day of January, 1994, the application of the respondent and insurance carrier for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Shannon S. Krysl, dated November 24, 1993, came on before the Appeals Board for oral argument by telephone conference.

APPEARANCES

Claimant appeared by her attorney Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney Vaughn Burkholder of Wichita, Kansas. There were no other appearances.

RECORD

The record is herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the Award of the Administrative Law Judge.

ISSUES

The sole issue before the Administrative Law Judge and this Appeals Board is the nature and extent of claimant's disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) Claimant is entitled permanent partial general disability benefits based upon a forty-two and one-half percent (42.5%) work disability.

On or about May 4, 1991, claimant was working for the respondent, Rubbermaid, Inc., when she developed muscle spasms in her low back as a result of repetitive bending and twisting while working on the "tote" line. Claimant reported her injury to respondent and was referred to Dr. Sturich for treatment. As a result of this injury, claimant ultimately saw several physicians for treatment and received epidural steroid injections and physical therapy. The injections helped claimant for a period of approximately three months. However, when the injections wore off claimant's muscle spasms returned.

Claimant was off work for her low back injury from approximately May 9 through May 12, 1991. Claimant returned to work for several days and then was off again from approximately May 20 through June 16, 1991, returned to work for approximately a month and a half and was taken off work again July 26, 1991. While she was off work, claimant was terminated for unexcused absences when she missed work in May due to her back injury but did not have a physician's off-work slip.

Claimant applied for vocational rehabilitation benefits and was given a plan assessment. The claimant has been looking for secretarial jobs with wages in the $6.00 to $9.00 per hour range.

The claimant was referred to Ernest R. Schlachter, M.D., a general medical practitioner, by claimant's attorney for evaluation. Dr. Schlachter diagnosed the claimant as having chronic lumbosacral sprain and rated claimant as having a five percent (5%) permanent partial impairment of function to the body as a whole based upon the *Guides to the Evaluation of Permanent Impairment*, Third Edition, Revised, published by the American Medical Association, plus the doctor's experience in doing evaluations over thirty-five years. Dr. Schlachter believes that claimant should observe the restrictions and limitations of no single lifts over forty-five (45) pounds; no repetitive lifting over thirty-five (35) pounds; no repetitive bending or twisting; and, no working in awkward positions. Dr. Schlachter believes that claimant should have a job where she can sit part time and stand part time.

Claimant was sent by respondent to Robert A. Rawcliffe, M.D., for an independent medical examination. Dr. Rawcliffe is a board certified orthopedic surgeon who no longer performs surgery. The primary emphasis of Dr. Rawcliffe's practice is performing independent medical examinations. Dr. Rawcliffe believes that claimant has sustained a lumbar strain as a result of her work activities in May of 1991, but would normally anticipate a complete recovery from this type of injury in less than 2 -3 months. Dr. Rawcliffe believes that claimant has a five percent (5%) impairment of function to the body as a

whole due to her lumbar condition and should be restricted to the medium work category with occasional lifting up to fifty (50) pounds; frequent lifting up to twenty-five (25) pounds; and, should avoid frequent bending and twisting. Dr. Rawcliffe believes that claimant's permanent impairment due to the lumbar condition is not related to work activities, but caused by her being overweight and having poor muscle tone. At the time of Dr. Rawcliffe's examination on August 10, 1992, claimant stood 5'3" tall and weighed two hundred-twenty (220) pounds. It should be noted that claimant gained eighty (80) pounds after injuring her back in May of 1991.

Based upon the evidence presented, the Appeals Board finds that claimant has experienced a low back strain that has resulted in a five percent (5%) permanent partial impairment of function to the body as a whole.

(2) Claimant was interviewed by Jerry Hardin on April 20, 1992, at the request of her attorney. Jerry Hardin has been a Human Resource/Personnel consultant for twenty-three years and is an expert in that area. After obtaining general background information on the claimant, including her education and past work history, and reviewing vocational rehabilitation and medical records, Mr. Hardin opined that claimant has a forty to fifty percent (40% - 50%) loss of access to the open labor market based upon the medical restrictions of Dr. Schlachter. Mr. Hardin also believes that claimant has experienced a loss of ability to earn comparable wage in the range of twenty-three to forty-five percent (23% - 45%), assuming claimant is now capable of earning $5.00 to $7.00 per hour. At the time of Mr. Hardin's deposition, claimant had not been evaluated by Dr. Rawcliffe and, therefore, his restrictions were not available.

Claimant was referred by respondent to be evaluated by Karen Terrill, a vocational rehabilitation counselor and consultant. Assuming it was proper to eliminate a portion of claimant's pre-injury labor market due to an alleged pre-existing injury to the right arm, Ms. Terrill believes that claimant has lost nine percent (9%) of the labor market as a result of her back injury and the related restrictions pertaining to bending and twisting. This opinion assumed that pre-injury claimant was restricted to light duty work as a result of her arm injury and had lost the entire medium labor category despite the fact that claimant's alleged pre-existing restrictions pertained to the right arm only. Assuming one does not eliminate a portion of the claimant's pre-injury labor market due to the impairment of the right arm, Ms. Terrill believes that claimant has lost access to approximately twenty-six percent (26%) of the open labor market due to the restrictions against repetitive bending and twisting. In arriving at the 26% loss of labor market, Ms. Terrill assumes that claimant had the pre-injury ability to work in the medium labor category and the post-injury ability to work in the light and sedentary categories. However, Ms. Terrill in arriving at this conclusion did not consider the weight lifting restrictions related to the back.

Under the facts presented, the Board finds the opinion of Jerry Hardin persuasive regarding loss of access to the open labor market as a result of claimant's accidental injury.

In Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990), the Court held permanent partial general disability is determined by the extent (percentage) of the reductions of an employee's ability to perform work in the open labor market and the employee's ability to earn comparable wages. The Court in Hughes held that both must be considered in light of the employee's education, training, experience, and capacity for rehabilitation. In Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991), the Court of Appeals adopted the requirements

of Hughes, noting that in calculating permanent partial general disability, a mathematical equation must be used. The Schad Court noted that the trier of fact in Hughes gave equal weight to the two elements and averaged the two arriving at a percentage, but held that it was not error to give more weight to one of the elements.

K.S.A. 1990 Supp. 44-510e(a) requires a balancing of two factors: ability to perform work in the open labor market and ability to earn comparable wages. These factors are considered in light of the employee's education, training, experience, and capacity for rehabilitation. This statute is silent as to how the percentage is to be computed.

In the case at hand, the Appeals Board finds that the loss of access to the open labor market and loss of ability to earn comparable wage should be given equal weight. The Appeals Board finds that claimant does retain the ability to earn approximately $6.00 per hour, or $240.00 per week, and that claimant's loss of ability to earn comparable wage is approximately forty percent (40%). Giving the forty percent (40%) loss of ability to earn comparable wage and forty-five percent (45%) loss of labor market access equal weight, the Board finds that claimant has experienced a work disability of forty-two and one-half percent (42.5%) and is entitled to permanent partial general disability benefits based upon that rating.

Respondent contends that the presumption of no work disability set forth in K.S.A. 1990 Supp. 44-510e should apply. The Appeals Board does not agree. The Appeals Board finds that claimant was only temporarily returned to the respondent's employ after her accident on May 4, 1991. The evidence fails to establish that claimant was physically able to perform the job duties she was assigned after her injury as she periodically missed and was taken off work on several occasions due to the ongoing problems with her back. In fact, the evidence indicates that claimant was terminated in August of 1991 after being taken off work by her physician on July 26, 1991.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated November 24, 1993, is modified as follows:

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Dana S. Hoffer, and against the respondent, Rubbermaid, Inc., and its insurance carrier, Lumbermens Mutual Casualty, for an accidental injury occurring on May 4, 1991. The claimant is entitled to 13.22 weeks temporary total disability at the rate of $267.43 per week or $3,535.42, followed by 401.78 weeks at $113.66 or $45,666.31 for a forty-two and one-half percent (42.5%) permanent partial general body disability, making a total award of $49,201.73.

As of November 20, 1993, there would be due and owing to the claimant 13.22 weeks temporary total compensation at $267.43 per week in the sum of $3,535.42 plus 119.78 weeks permanent partial compensation at $113.66 per week in the sum of $13,614.19 for a total due and owing of $17,149.61 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of $32,052.12 shall be paid at $113.66 per week for 282 weeks or until further order of the Director.

The remaining orders of Administrative Law Judge Shannon S. Krysl in her Award of November 24, 1993, and Award Nunc Pro Tunc dated December 6, 1993, are affirmed and adopted by the Appeals Board as if specifically set forth herein.

IT IS SO ORDERED.

Dated this ____ day of April, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Robert R. Lee, 1861 N. Rock Road, Wichita, KS 67206
Vaughn Burkholder, 700 Fourth Financial Center, Wichita, KS 67202
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director